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Office of Administrative Law Judges
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Date Issued: April 27, 1999

Case Nos: 1998-LHC-952 and 1998-LHC-953

In the Matter of

DONALD LEROY TACKETT

Claimant

v.

MATTS ENTERPRISES, INC.

Employer

BARGE AND RAIL TERMINALS, INC.

Employer

FIREMEN'S FUND INSURANCE CO.

Carrier

and

Director, Office of Workers' Compensation Programs

Party-in-Interest

APPEARANCES:

R. Matthew Moore, Esq. and Walter Hornbeck, Esq.
Schletker, Hornbeck & Moore
Covington, Kentucky
For Claimant

Albert T. Brown, Esq.
Brown & Warnock
Cincinnati, Ohio
For Barge and Rail Terminals, Inc. and Firemen's
Fund Insurance Co.

Phillip Bruce Lesley, Esq.
McBrayer, McGinnis, Leslie & Kirkland
Greenup, Kentucky
For Matt's Enterprises, Inc.

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

DECISION AND ORDER-AWARDING BENEFITS

This proceeding arises from a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 et seq. The case was referred to the Office of Administrative Law Judges on January 22, 1998.

Following proper notice to all parties, a formal hearing was held on September 30, 1998 in Cincinnati, Ohio. The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. Although perhaps not specifically mentioned in this decision, each exhibit received into evidence has been carefully reviewed and thoughtfully considered. References to "ALJX", "CX", "BR", and "JX" refer to the Administrative Law Judge Exhibits, Claimant Exhibits, Barge and Rail Terminals, Inc. (hereinafter "Barge and Rail") Exhibits, and Joint Exhibits, respectively. The transcript of the hearing is cited "Tr." and by page number.

ISSUES WITH RESPECT TO BARGE AND RAIL

1. Whether Claimant suffered a new injury or aggravation of an existing injury in the course of his employment with Barge and Rail on June 9, 1994.
2. Whether Employer is entitled to credit under 33 U.S.C. 903(e) for sums paid under Ohio and Kentucky Workers' Compensation.
3. Claimant's average weekly wage as determined under 33 U.S.C. 910.
4. Whether Claimant's application, filed April 4, 1996, was timely filed.
5. Whether Claimant is permanently and totally disabled pursuant to 33 U.S.C. 908.
6. Whether Claimant is entitled to permanent partial disability under 33 U.S.C. 908.
7. Whether Claimant is entitled to medical benefits for his knee injury and depression.

8. Whether Barge & Rail, the employer at the time of the first injury, is entitled to section 8(f) relief on the bases that (a) Claimant's injury of January 22, 1994 aggravated a dormant condition and (b) Claimant's injury of June 9, 1994 was a new and distinct injury, not "the natural or unavoidable result of" the January 22, 1994 event.

9. The date of maximum medical improvement.

(JX 1, Tr. 27-8).

ISSUES WITH RESPECT TO MATT'S ENTERPRISES, INC.

1. Jurisdiction under the Act (33 U.S.C. 902(3)).
2. Whether the claim was timely filed.
3. Nature and duration of the injuries.
4. Whether the Claimant is permanently and totally disabled as a result of injuries from the accident (33 U.S.C. 907).
5. Average weekly wage (33 U.S.C. 910(A,B,C)).
6. Medical expenses (33 U.S.C. 907).
7. Causal relationship of any claimed medical bills.
8. Amount of credit for prior payments to which Employer is entitled if Claimant is entitled to an award under the Act.

(JX 2, Tr. 29)

FINDINGS OF FACT

Background

Donald Tackett testified at the hearing on September 30, 1998 (Tr.), by deposition on February 2, 1995 for his workers' compensation claim (BR 1), by deposition for his claim under the Act on April 1, 1998 (BR 3), and at a hearing on March 1, 1995 before Kentucky's Department of Workers' Claims (BR 2). He is fifty-five years old and has a ninth grade education. (Tr. 41-2). He did very poorly in school. (Tr. 42). After leaving the military, Claimant's work consisted of hanging cow hides for a leather

company, working as a deckhand on a tow boat, digging ditches, hanging automobile crankshafts on an assembly line, working as a mechanic for a mine service company, and finally, truck driving. (BR 1 at 10; Tr. 42-44). Prior to working at Matt's Enterprises, Inc. (hereinafter "Matt's"), Claimant's only workplace injury was a minor back strain sustained in an employee football game. (Tr. 45).

Claimant started working for Matt's in November, 1993. (Tr. 46). He estimated that he worked about forty-two or forty-three hours per week. (BR 1 at 14). Matt's hauls scrap from barges to various locations. (Tr. 47). He worked part time for two weeks and then switched to full time. (Tr. 210). When he started at Matt's, he had no knee problems or other physical problems which would prevent him from doing his job. He was not given a pre-employment physical. (Tr. 48). After driving a dump truck for two weeks, Claimant was given a tractor trailer to drive at Barge and Rail at Southpoint, Ohio on the Ohio River bank. (Tr. 48-9). The tractor trailer was an 18-wheeler with a ten-speed transmission. (Tr. 214). He would have to clutch twenty times to go from a dead stop to tenth gear and back to a dead stop. (Tr. 217). On the days that there was no work at Matt's, Claimant worked as an independent owner operator. (Tr. 212-213). He never turned down work at Matt's to work as an owner operator. (Tr. 214).

Both Matt's and Barge and Rail were owned by Tom Hatfield. (Tr. 60). Danny Hineman was in charge of the Southpoint Terminal for Barge and Rail and supervised the employees of Matt's. (Tr. 60-1). Claimant's job involved backing his tractor trailer onto a dock so that it could be loaded with scrap metal by a crane. (Tr. 62). Claimant would then clean up scrap from under the trailer by hand and instruct the crane operator on where to remove the heavier pieces. (Tr. 63). He helped the crane operator in this fashion on a daily basis, but only for ten to fifteen minutes at a time. (Tr. 66-7). The other truck drivers assisted the crane operator in this manner as well. (Tr. 68). Claimant wasn't told to stay off of the barges. (Tr. 68). He remained on site, hauling scrap to a storage field about seventy or seventy-five percent of the time. (Tr. 64).

On January 22, 1994, Claimant was working on the barge spotting for the crane operator and moving steel ingots so the crane operator could remove them. (Tr. 72). He was paid by Barge and Rail for this work. (Tr. 225). The ingots were loaded in trucks from Matt's and dumped in a field. (Tr. 73). While throwing the ingots, Claimant slipped on some ice and fell in between the ingots. (Tr. 74). He turned to catch himself and heard his knee pop. (Tr. 74). Following the accident, he had a burning, aching pain in his knee. (Tr. 75). He returned to work the next day and reported the injury to Danny Hineman for the first

time. (Tr. 75). On Monday morning, he reported it to Burl Hankins. (Tr. 75-6). Mr. Hankins took Claimant off of the ingot loading job and told him to just drive the truck. (Tr. 77). Claimant's knee pain caused him a great deal of difficulty entering and exiting the truck and shifting. (Tr. 78).

About four days after the accident, Claimant went to the emergency room of King's Daughter's Medical Center for his knee pain. (Tr. 78). He was given pain-killers, his knee was put in a brace, an x-ray was taken, and he was referred to Dr. Robert Love, a knee surgeon. (Tr. 79). Dr. Love performed surgery on Claimant's knee on February 1, 1994. (Tr. 80). He prescribed medications for Claimant and sent him to physical therapy. (Tr. 82). Claimant attended physical therapy at Ashland Physical Therapy Center two to three days per week. (Tr. 82). He didn't feel that his knee improved any during this time. (Tr. 82). The knee pain made it difficult for him to use stairs and enter and exit vehicles. (Tr. 85). On April 20, 1994, Dr. Love told Claimant that he had reached maximum medical improvement and that he could attempt to go back to work in a couple of weeks. (Tr. 88). Claimant was allowed to return without restriction. (Tr. 176). On April 19, he slipped on his driveway and felt a sharp pain in his leg. (Tr. 90). The pain following this incident however, was no different than it had been. (Tr. 90).

Claimant returned to work on approximately May 4, 1994 at the Barge and Rail terminals in Southpoint, Ohio. (Tr. 152). His pay rate had increased to seven dollars an hour. (Tr. 91). He worked fairly regularly, but missed a few days due to knee pain. (Tr. 91). Claimant estimated that he was working ten hour days. (Tr. 102). His time sheet indicates that he usually worked around forty hours per week after his return. (CX 19 at 2). His work consisted entirely of unloading barges at Southpoint Terminal. (Tr. 94). His truck was loaded at the barge and he drove 300 to 400 feet to dump the scrap in a field. (Tr. 226). Mr. Hineman told Claimant that Mr. Hatfield had ordered that Claimant not go on the barges anymore. (Tr. 95). This was the first time that Claimant had been told to stay off of the barges, and he refused to work on them after this. (Tr. 95, 224).

Claimant had problems with his knee entering and exiting the truck, shifting gears, working the clutch, and trying to walk around in the field. (Tr. 91). He treated his knee by icing it and using a TENS unit. (Tr. 91). He reported his trouble to Mr. Hineman and Mr. Hankins. (Tr. 92). Dr. Love prescribed powerful pain pills and told Claimant to try and continue his work. (Tr. 93). Claimant began to feel depressed. (BR 3 at 104).

On June 9, 1994, Claimant was hauling scrap out of the barges on the river into the field. (Tr. 96, 99). He raised his bed up so that it could be unloaded and the scrap came loose, causing the weight to fall backward and jerked the truck up off of the ground and flipped it onto the passenger side. (Tr. 97, 103). Claimant held onto the steering wheel. (Tr. 97). His left leg was caught in the seat. (Tr. 104). When the tractor went over, it hit on the side and Claimant came out of the driver's seat and hit the back of his head and shoulders, while the interior parts of the dash came loose and struck him in the face. (Tr. 98). Skin was torn from his calf and the back of his knee. (Tr. 170). Claimant escaped through the truck's broken windshield, ran, and collapsed. (Tr. 98; BR 3 at 96).

About four hours after the accident, Claimant went to King's Daughter's Medical Center to seek treatment. (Tr. 99). He was having bad headaches and had a big gash in his head. (Tr. 100). He also had pain in his neck, shoulder, lower back, calf, and knee. (Tr. 100). Claimant was advised not to return to work. (Tr. 101). Claimant opined that the pain in his knee was the same after the second accident as it was before it. (Tr. 106). He now had headaches, neck pain, and shoulder pain. (Tr. 108). Claimant testified that he has not worked anywhere since the truck accident and has not applied for any work. (Tr. 109, 241). His pay stubs however, indicate that he worked twenty-nine hours on the week of July 3, 1994. (CX 19 at 2).

Claimant returned to Dr. Love, who prescribed pain medication. (Tr. 110). He also saw Dr. Justice, his family physician, in July and was given a pain shot. (Tr. 111). A few days later, Claimant started therapy at Ashland Physical Therapy. (Tr. 112). He thought that the physical therapy made him worse. (Tr. 114). Claimant was referred to Dr. Abler, a neurologist. (Tr. 114). Dr. Abler referred Claimant to Dr. Powell, a surgeon, who operated on Claimant's neck on January 16, 1995. (Tr. 117-118). Dr. Powell referred Claimant back to Dr. Love to treat a torn rotator cuff. (Tr. 117). Dr. Abler referred Claimant to Dr. Aitkens for cortisone shots to treat his shoulder. (Tr. 118). Dr. McCollister saw Claimant next on a referral from Dr. Powell. (Tr. 119). At this point, Claimant was having knee problems, neck pain, lower back pain, and headaches. (Tr. 119). Dr. McCollister referred Claimant to Dr. Powell for problems with his neck and wrist. (Tr. 121). He referred Claimant to Dr. Tibbs for back pain. (Tr. 121). Dr. McCollister referred Claimant to Dr. Herr, a surgeon, for his left knee pain. (Tr. 121). Dr. Herr operated on Claimant in March, 1998. (Tr. 122). Since the surgery, Claimant no longer has the aching, burning sensation in his knee, but it is still weak and tender. (Tr. 122). Dr. McCollister also referred Claimant to Dr. Borders, a psychiatrist. (Tr. 122-3). Dr. Borders has treated

Claimant for depression and prescribed medicine for him which seems to help his mood. (Tr. 123, 231).

At the time of the hearing, Claimant's symptoms involved his back, shoulder, neck, and knee. (Tr. 126). He attributed his knee pain to his fall in January, 1994. (Tr. 127). His knee pain however, is not responsible for his headaches or dizzy spells. (Tr. 185). His lower back injury caused paralysis from his left hip down to his foot. (Tr. 186).

Since the June 9, 1994 accident, Claimant has received \$230.32 per week from the State of Ohio as workers' compensation. (Tr. 207). He can no longer drive an 18 wheeler and does not think that he could pass a physical to do so. (Tr. 238). He testified that the injuries to his neck, shoulder, back, and knee all prevent him from being a truck driver. (Tr. 238). He does not think that he can work at all anymore. (Tr. 240-1). Even without the June 9 accident, Claimant did not believe that he could have continued working. (BR 2 at 5).

I found Donald Tackett to be a credible witness.

Claimant's wife, Barbara Ellen Tackett testified at the hearing. (Tr. 300). Prior to January 22, 1994, she believed her husband to be in very good physical condition. (Tr. 301). He had no complaints about his knee, back, or neck. (Tr. 301). On the evening of January 22, 1994, Mrs. Tackett observed that her husband's knee was swollen and puffy. (Tr. 302). She observed no improvement after his surgery. (Tr. 303). She noticed that Claimant had trouble walking and climbing steps and that he became depressed. (Tr. 304, 307). She testified that he has not had a day free of pain since January 22, 1994. (Tr. 311). After the second injury, Claimant did not return to work. (Tr. 307). Mrs. Tackett testified that she handles the household finances and that her husband has trouble understanding people and conversations. (Tr. 309).

I found Barbara Tackett to be a credible witness.

Donald L. Waugh testified at the hearing. (Tr. 317). Mr. Waugh worked from December 1993 to March, 1995 as a truck driver for Matt's. (Tr. 319). His job was identical to Claimant's. (Tr. 335). He testified that most of the trucks were nine speeds with tight clutches. (Tr. 322). He was not aware of any trucks being used that had automatic transmissions. (Tr. 340). The trucks were loaded on a sunken barge which served as a dock. (Tr. 321). It was also on this dock that the drivers, including Mr. Tackett, would have to clean up scrap metal that had spilled and assist the crane operator in picking up heavier pieces. (Tr. 323, 327).

Assisting the crane operator took between 15 minutes and an hour at a time. (Tr. 326). After Mr. Tackett was hurt, Danny Hineman and Burl Hatfield instructed Mr. Waugh to stay off the barges. (Tr. 330).

When Mr. Tackett returned to work after his first injury, he seemed to have trouble climbing into and out of his truck cab and he complained about knee problems. (Tr. 333-34). Mr. Waugh never saw Claimant return to work after his second accident on June 9, 1994. (Tr. 335). Mr. Waugh took over Claimant's job after he was injured on June 9, 1994. (Tr. 335).

I found Mr. Waugh to be a credible witness

Mr. Burl Hankins testified at the hearing (Tr. 349) and by deposition. (CX 33). He is the General Operations Manager for Matt's and is the direct supervisor of the drivers for Matt's. (Tr. 354). He testified that Claimant was utilized by Matt's like a full-time employee. (CX 33 at 52). Truck drivers back their trucks onto a dock to be loaded by the crane. (CX 33 at 21). They hand load the pieces of scrap that fall and direct the crane operator where to pick up the bigger pieces. (CX 33 at 21). He testified that there were a couple of occasions on which Claimant didn't report to work because he was doing his own independent hauling, but that this was rare. (Tr. 351).

Mr. Hankins testified that there was an ongoing problem with truck drivers being out on the barges prior to the January, 1994 accident and that all drivers were instructed not to go on the barges. (Tr. 355, 380). He had seen Claimant on the barges and told him to get off of them. (CX 33 at 27). No drivers were ever fired, suspended, or fined for this activity. (Tr. 381).

The first time Claimant was injured, he was doing a short term job for Barge and Rail. (CX 33 at 31-3). When Claimant returned to work after his first accident, Mr. Hankins had him drive the truck again and told Claimant to let him know if he was having any trouble with his knee. (Tr. 356). Occasionally, Claimant worked in the shop and explained how to perform maintenance on the trucks. (Tr. 356, 360). On a few occasions, Claimant worked on vehicles and helped to prepare them. (Tr. 360).

When he was working as a truck driver, Claimant had to back down to the dock to get his load and then dump it at the field. (Tr. 357). The trucks had ten speed transmissions. (Tr. 361). Mr. Hankins testified that an experienced truck driver could use his clutch less to shift gears than a new driver. (Tr. 364). He never saw Claimant drive a truck in this fashion which required less clutching. (Tr. 367).

Mr. Hankins did not know whether Claimant returned to work after his June 9, 1994 accident, but he thought that he did not. (Tr. 366; CX 33 at 51). He testified that Claimant was a good, dependable employee. (CX 33 at 40).

I found Burl Hankins to be a credible witness.

The deposition of Sandra Tuinstra was taken on September 22, 1998. (CX 34). Ms. Tuinstra handles all of Tom Hatfield's business books. (CX 34 at 4). She testified that Claimant only worked three days for Barge and Rail in 1994. (CX 34 at 17). Her records indicated that Claimant was paid on July 3, 1994. (CX 34 at 24). She testified that Claimant worked less than forty hours per week in 1993. (CX 34 at 19).

Vocational Evidence

Janet Pearson testified at the hearing. (Tr. 252). She works in the field of vocational rehabilitation for the State of Kentucky and has her own private consulting business. (Tr. 252). She is Board Certified by the American Board of Vocational Experts. (CX 16 at 14). She interviewed Claimant on August 13, 1998, conducted a vocational assessment, and prepared a report. (Tr. 252-3). In preparing for her testimony and her report, Ms. Pearson reviewed depositions of Dr. Love, Dr. Herr, Dr. Borders, Dr. Kroening, and Mr. Hankins. Since the report, she has also reviewed depositions from Drs. Goodman and McCollister. (Tr. 252-3, 257). Additionally, she reviewed medical records from Drs. Love, Herr, Borders, McCollister, Craythorne, Templin, and Goodman. (CX 16 at 3).

Ms. Pearson opined that Claimant is unable to return to his past work or to perform any kind of work as a result of his January 22, 1994 injury. (Tr. 255). She found that the June 9, 1994 accident added to Claimant's difficulties, but that he would be one hundred percent disabled even if this accident never occurred. (Tr. 255, 289). She disagreed with Dr. Goodman's opinion that Claimant may be able to work in the trucking industry since larger trucks require using a clutch and jobs driving smaller trucks with automatic transmissions usually involve walking and lifting. (CX 16 at 5). She did not think that Claimant was suited to performing sedentary work. (Tr. 280). She found him to have reasoning skills on a fourth to sixth grade level. (Tr. 283).

I found Janet Pearson to be a credible witness.

Medical Evidence

King's Daughters' Medical Center (hereinafter King's Daughters') records indicate that Claimant was examined on January 26, 1994. (CX 1 at 2). Dr. Ray's impression was to rule out meniscal injury in the left knee. Claimant was placed in a knee immobilizer and scheduled to see Dr. Love. A radiology report taken on the same day and read by Dr. Allen Bond revealed mild degenerative osteoarthritic change of the left knee and suprapatellar effusion. No fracture or dislocation was apparent. (CX 1 at 4).

Claimant was again examined at King's Daughters' on June 9, 1994 in relation to his truck accident. (CX 1 at 35). Radiology reports read by Dr. George B. Smith revealed some degenerative osteophytic encroachment of both C7 neural foramen in the cervical spine, normal left knee, normal left shoulder, and normal sternum. (CX 1 at 38). Dr. Ray's report stated that the truck accident resulted in Claimant's leg being caught beneath his seat and twisted. (CX 1 at 43). On examination, a minor abrasion of the knee and upper left calf was observed. His impression was a contusion. (CX 1 at 43). The qualifications of the doctors at Kings' Daughters' are not in the record.

On July 8, 1994, Dr. Oren W. Justice stated that Claimant told him that his leg got stuck when his truck turned over and that he was twisted and turned in the accident. (CX 11 at 1). On July 29, 1994, Dr. Justice stated that the fact that Claimant was forgetting to take his pain medication suggested that he might not be experiencing much pain. (CX 11 at 1). On August 31, 1994, Dr. Justice stated that he could not understand Claimant's symptoms and that he was referring him to Dr. Abler. (CX 11 at 2). Dr. Justice's qualifications are not in the record.

Dr. James Templin evaluated Claimant on November 21, 1994. (CX 4). He is the medical director of the comprehensive pain management center at Cardinal Hill Rehabilitation Hospital. (CX 4 at 5). He took Claimant's history and conducted a physical evaluation. (CX 4). He stated that Claimant reported a significant increase in knee pain after his truck accident. (CX 4 at 2). Claimant complained of difficulty going up stairs, neck pain, back pain, left shoulder pain, and left arm weakness. (CX 4 at 2). Dr. Templin's impression was, in relevant part, chronic left knee pain, low back pain secondary to musculoligamentous strain, cervical pain, left shoulder pain, left knee arthritis, and obesity. (CX 4 at 4). He rated Mr. Tackett as having a twelve percent impairment of his person. (CX 4 at 4). He opined that Claimant was unable to return to his job and that substantial use of his knee would enhance deterioration and increase the need for a total knee replacement. (CX 4 at 5).

On September 15, 1994, Dr. C. Victor Abler examined Claimant. Dr. Abler is a Doctor of Osteopathy. (CX 5 at 10). His impression was to rule out C-spine radiculopathy and musculoskeletal strain. (CX 5 at 10). On September 26, 1994, Dr. Abler found no evidence of radiculopathy or neuropathy from an EMG. (CX 5 at 6). On November 17, 1994, Dr. Abler's impression was left C6 radiculopathy. (CX 5 at 11). He referred Claimant to Dr. Powell.

Dr. James S. Powell is a neurological surgeon. On November 30, 1994, he confirmed that Claimant had a large disc herniation laterally at C6/7. (CX 6 at 23). Dr. Powell conducted a C6-7 anterior cervical discectomy, partial colpectomy of C6 with autograft fusing of the right iliac crest on January 16, 1995. (CX 6 at 40). Dr. Powell reported that Claimant was doing quite well on release. On February 23, 1995, Dr. Powell found that Claimant was doing quite well and that his only problem was left subacromial bursitis. (CX 6 at 24). On June 28, 1995, Dr. Powell opined that Claimant was not yet at maximum medical improvement. (CX 6 at 27). On August 22, 1995, Claimant continued to have trouble with pain in his shoulder and neck region. (CX 6 at 17). On August 23, 1995, Dr. Powell referred Claimant to Dr. McCollister and opined that Claimant was still not at maximum medical improvement. (CX 6 at 30). He advised Claimant that the likelihood that he could return to work was slim. (CX 6 at 30). On March 13, 1996, Dr. Powell again opined that Claimant was not at maximum medical improvement. (CX 6 at 36). He opined that Claimant had evidence of bilateral severe carpal tunnel syndrome.

Dr. Aitken, an orthopedic surgeon, examined Claimant on July 20, 1995. Claimant reported pain around the left shoulder, with pain radiating into his forearm and numbness and tingling in his hand. (CX 7 at 1). Claimant noted that this has improved since Dr. Powell's surgery. Dr. Aitken injected Claimant's left shoulder with Celestone and Xylocaine. On August 22, 1995, Dr. Aitken noted that the injection had freed up Claimant's arm, but that this caused him more pain. (CX 7 at 3). On September 26, 1995, Dr. Aitken advised Claimant that he would be better off not getting rotator cuff surgery. He noted that Claimant experienced pain from his neck to his hand whenever he tried to use his left arm. (CX 7 at 5).

Dr. Phillip Tibbs, a professor of neurology, examined Claimant on November 22, 1995. (CX 8). Dr. Tibbs reported that Claimant continued to have some numbness in his hand after Dr. Powell's operation. He stated that Claimant had pain in his shoulder with movement and that he was unable to pick things up because of pain in the arm, forearm, shoulder, and neck. (CX 8 at 2). Claimant also complained of lower back pain and occasional pain in the left leg. (CX 8 at 2). Dr. Tibbs found that Claimant had multiple

levels of disc disease in his neck. (CX 8 at 3). He recommended conservative treatment. (CX 8 at 3). He opined that Claimant could not work at a job that involved heavy lifting, but that he may be able to continue in a lighter duty job. (CX 8 at 3).

Dr. Colin M. Craythorne examined Claimant on November 16, 1995. (CX 9). His impression was that Claimant had suffered a strain to the cervical spine, the lumbar spine, and the left shoulder which were reasonably related to the accident of June 9, 1994. (CX 9 at 4). He opined that Claimant had reached maximum medical improvement with regard to the cervical spine and left shoulder. He opined that Claimant's condition was permanent and that he would never be able to return to work as a truck driver. (CX 9 at 4). He stated that Claimant could perform light or sedentary work. He found all of Claimant's medical treatment to be appropriate. (CX 9 at 5). Dr. Craythorne's qualifications are not in the record.

The deposition of Marilyn Sue Stevens was taken on September 16, 1998. (CX 35). Ms. Stevens is a registered nurse case manager for Concentra Managed Care. (CX 35 at 4). She spent twenty years as a registered nurse at King's Daughters' and her experience included working on a medical surgical floor, a year and a half in a drug/alcohol rehabilitation facility, and work all over the hospital. (CX 35 at 6-7). In her drug rehabilitation work, Ms. Stevens was trained in recognizing the signs and symptoms of depression. (CX 35 at 14). In 1994, she was employed by Comprehensive Rehabilitation Associates (hereinafter, CRA) as a registered nurse case manager. (CX 35 at 4). Her job included meeting with Mr. Tackett and coordinating his treatment. (CX 35 at 5). She saw Claimant approximately six times. (CX 35 at 15). She saw him for the first time on February 16, 1994 and for the last time on April 20, 1994. (CX 35 at 15). She did not observe Claimant to demonstrate any signs of depression, but was unwilling to offer an opinion on whether he had depression. (CX 35 at 16, 31).

Ms. Stevens' notes indicated that Claimant was on full time, permanent status at work. (CX 35 at 24). On March 1, 1994, Ms. Stevens noted that Claimant was motivated to return to work. (CX 15 at 2). On March 3, she made the assessment that Claimant had arthritis in his left knee and that the injury could result in possible worsening arthritis which would inhibit his ability to use the clutch in the trucks at work. (CX 35 at 25). In a report dated March 4, she wrote that she was concerned about the requirement that Mr. Tackett use his left leg to operate a clutch at work. (CX 35 at 26). On March 15, she again expressed concern that the injury to Claimant's left knee could pose a deterrent to returning to his job. (CX 35 at 28).

The deposition of Dr. T. Robert Love was taken on June 24, 1998. (CX 27). Dr. Love is Board Certified by the Royal College of Physicians and Surgeons in Canada. (CX 27 at 3). He first examined Claimant in January, 1994 for his left knee injury. He continued to treat Claimant until July, 1994. (CX 27 at 4,8). Dr. Love's initial impression was that Claimant may have torn his meniscus. (CX 27 at 5). On February 1, 1994 however, he found that Claimant had arthritis in his knee, but his meniscus was normal. (CX 27 at 9; CX 1 at 28). He found that Claimant had osteoarthritis, a progressive disease with no cure, and testified that he had this condition prior to his injury at work, but was unaware of it until it was worsened by the workplace accident. (CX 27 at 31, 33). Dr. Love disagreed with the opinion that Claimant's meniscus tear was present subsequent to the January 22, 1994 injury. (CX 27 at 11). He testified that he does hundreds of arthroscopes per year and that Claimant's meniscus tear was definitely not caused by his January, 1994 accident. (CX 27 at 30). He testified that Claimant was at maximum medical improvement on April 20, 1994 and that he told him to return to work in two weeks. (CX 27 at 17). Claimant reported difficulty operating the clutch of his truck. (CX 27 at 32).

On June 13, 1994, Dr. Love examined Claimant regarding his truck accident at work. (CX 27 at 19). Claimant stated that he had re-injured his knee. (CX 27 at 19). Dr. Love observed obvious bruising around Claimant's knee. (CX 27 at 19). His impression at that time was that Claimant had re-aggravated his arthritis. (CX 27 at 20). His opinion was that Claimant had end-stage arthritis in his patella femoral joint, which would limit his ability to use a clutch, carry loads, and walk long distances. (CX 27 at 29). He opined that Claimant's condition would get worse and that he may need re-scoping of his knee, arthritis medicine, and/or knee replacement. (CX 27 at 29). He testified that as of July, 1994, Claimant would not be able to work as a truck driver if the truck had a manual clutch. (CX 27 at 34). Dr. Love opined that Claimant had no disability by AMA guidelines, but stated that the guidelines do not account for pain and that Claimant did not have normal function of his knee. (CX 27 at 35-6). Dr. Love testified that Claimant made an effort to get better. (CX 27 at 35).

On May 6, 1995, Dr. Love examined Claimant for his left shoulder pain. (CX 2 at 8). He noted that Claimant recently had disc surgery on his neck, which relieved discomfort and weakness in his hand. Dr. Love diagnosed bursitis and a torn rotator cuff.

Dr. Daniel D. Cowell conducted a psychiatric evaluation of Claimant on May 22, 1998. (CX 14). Dr. Cowell found Claimant to be angry and bewildered in discussing his predicament with medical benefits and the conflicting opinions of the doctors. (CX 14 at

2). Claimant also expressed distress over the death of his son in 1983. (CX 14 at 3). Dr. Cowell diagnosed major depressive disorder, single episode, non-psychotic, and complicated bereavement. He also diagnosed a personality disorder, with dependent, borderline features. Claimant's stressors included unemployment, idleness, chronic pain, and frustration in dealing with the system. (CX 14 at 3). Dr. Cowell opined that Claimant had not reached maximum medical improvement with respect to his mood disorder. He stated that treatment with psychotropic medication and psychotherapy is appropriate and medically necessary. (CX 14 at 3). Dr. Cowell's qualifications are not in the record.

The deposition of Dr. David P. Herr was taken on June 25, 1998. (CX 28). He is Board Certified in Osteopathic Surgery. (CX 28 at 3). He first saw Claimant on June 17, 1997. (CX 28 at 4). Dr. Herr testified that the accident described in the June 9, 1994 King's Daughter's medical report was capable of producing a torn medial meniscus, but opined that the January 22, 1994 incident caused Claimant's knee injury. (CX 28 at 37). He opined that Dr. Love may not have seen a meniscus tear during his examination if the damage was internal. (CX 28 at 25). Earlier, on June 17, 1997, however, Dr. Herr stated that the logical conclusion was that the tear occurred on June 9, 1994 and that it would be difficult to understand how Dr. Love could have missed the tear if it were present during the arthroscopy. (CX 13 at 2). Similarly, on January 28, 1998, he stated that Claimant had reported a second knee injury in the June 9 truck accident. (CX 13 at 3).

Dr. Herr testified that Claimant's knee injury had left him permanently, partially disabled. (CX 28 at 18). He opined that Claimant was at maximum medical improvement on May 27, 1998. Using AMA guidelines, he estimated that Claimant was fourteen to fifteen percent disabled. (CX 28 at 18). He stated that if Claimant would moderate his activities, he would continue to do well for a period of months or years, but that the condition would progressively worsen. (CX 28 at 36).

Dr. Herr opined that Claimant would have difficulty with repetitive clutching of industrial vehicles and that his knee prevented him from successfully returning to work as a truck driver. (CX 28 at 37-8). He would restrict Claimant from kneeling and squatting, climbing ladders and stairs repetitively, repetitive foot control operation, and limit standing and walking to fifty or sixty percent of a typical day. (CX 28 at 38-9). Since Dr. Herr's operation, Claimant has told him that his knee feels better and functions better. (CX 28 at 42).

The deposition of Dr. Phil Borders was taken on June 25, 1998. (CX 29). He is a Board Certified psychiatrist. (CX 29 at 47). He

first saw Claimant on February 5, 1997 and noted that his depression was relatively severe. (CX 29 at 35). He testified that Mr. Tackett felt that he was suffering from depression in the spring of 1994. (CX 29 at 8). Dr. Borders used Mr. Tackett's self-assessment to determine that his depression was seventy five percent attributable to his January, 1994 accident. (CX 29 at 19). It is a generally accepted practice in the field of psychiatry to rely on what the patient tells the psychiatrist. (CX 29 at 35).

Dr. Borders opined that Mr. Tackett's inability to physically do things has contributed to his depression. (CX 29 at 27). He also opined that Claimant's current involvement in the legal process has revived his feelings about the killing of his son by a drunk driver. (CX 29 at 27). Dr. Borders testified that Claimant's depression has improved since Dr. Herr operated on his knee, but that Claimant continues to need treatment for his depression. (CX 29 at 22-3). He found that Claimant has below average intelligence and that he responds unusually poorly to things going wrong in his life. (CX 29 at 38-9). Dr. Borders agreed that registered nurses might be able to recognize the initial signs of clinical depression. (CX 29 at 31). He opined that Claimant wanted to work, but could not. (CX 29 at 42). He found that Claimant's low IQ, injuries, and poor coping skills rendered him unemployable. (CX 29 at 42).

Dr. Albert S. Heck examined Claimant on October 31, 1996. He is a neurologist. Dr. Heck found Claimant's neurological examination to be within normal limits. (BR 8 at 4). He opined that Claimant had reached maximum medical improvement from a neurological standpoint, but that he was unable to comment on Claimant's orthopedic condition. (BR 8 at 4). He opined that Claimant's treatment to date has been necessary and appropriate and stated that from a neurological standpoint, Claimant was capable of returning to work without restriction. (BR 8 at 5).

The deposition of Mr. Christopher Gunning was taken on June 25, 1998. (CX 30). He is a licensed physical therapist at Physical Therapy Center of Ashland (hereinafter, the center) who treated Claimant. (CX 30 at 3, 73). Claimant first reported to the center on February 25, 1994, two weeks after his surgery. (CX 30 at 5,9). Mr. Gunning found Claimant's left leg to lack five degrees from full extension. Flexion on the left was 125 degrees, compared to 135 degrees on the right. Manual muscle tests for the quadriceps and hamstring revealed the left leg to be one grade lower than the right and Claimant complained of pain at the medial joint line. (CX 30 at 7).

On March 8, 1994, Claimant reported that increased activity and ambulation on a concrete floor resulted in increased swelling

and soreness, but that the swelling subsided by the next day. By March 29, 1994, Claimant's range of motion in his left leg had increased and the strength in the left leg was now greater than that in the right. (CX 30 at 9-10). Claimant was still having trouble walking and still had tenderness over the medial aspects. (CX 30 at 10). On April 12, Claimant reported soreness after doing a lot of walking. (CX 30 at 20). Mr. Gunning observed that on April 19, Claimant's range of motion had decreased and swelling was at a higher level. (CX 30 at 25). The report for the April 19 visit attributed this to Claimant's fall on the previous Saturday. (CX 30 at 25). Mr. Gunning stated however, that it would be difficult to tell whether these symptoms were caused by the fall. (CX 30 at 80). Claimant's complaints regarding medial pain were consistent from the first time he came to therapy to the last. (CX 30 at 67). Claimant had no contact with the center between April 19 and July 11. (CX 30 at 26).

On July 11, 1994, Claimant presented with an injury to his lower back following a rollover in his tractor trailer. (CX 30 at 28). He had tenderness of the low back, decreased range of motion to the lumbar spine, decreased passive mobility of the lumbar spine, tight hamstrings and two joint hip flexors, and weak lower abdominals and low back. (CX 30 at 99). Mr. Gunning testified that hamstrings and hip flexors are involved in working a clutch. (CX 30 at 100). Claimant reported that he continued to work following the accident. (CX 30 at 29). He returned for a functional capacity evaluation on July 14, 1994. (CX 30 at 26-8). Records from the center revealed that Claimant had a hard time doing low level movement exercises for his back and had radiating symptoms into his left leg and groin. (CX 30 at 33). A physical therapist named Todd Munson recommended that Claimant utilize a conventional truck cab, avoid clutching, and not be responsible for loads requiring a one hundred pound tarp. (CX 3 at 23). If these restrictions could not be satisfied, Mr. Munson recommended that Claimant not continue with his job. (CX 3 at 23).

Claimant went to the center six more times after July 15. (CX 30 at 32). His knee extension was worse than it was in March. (CX 30 at 38). He canceled a July 29 appointment due to low back soreness after driving. (CX 30 at 86). Claimant was never fully discharged from the center. (CX 30 at 34).

Dr. Randall McCollister was deposed on September 16, 1998. (CX 31). He is Board Certified in Internal Medicine. (CX 31 at 5). He treats patients with knee, neck, back, and shoulder problems. (CX 31 at 6). Dr. McCollister examined Claimant for the first time on September 20, 1995. (CX 31 at 7). He used MRI and CT scans to help define what Claimant's problems were. (CX 31 at 13). He then began treating Claimant's shoulder and lumbar

herniated disc conservatively. (CX 31 at 13). Claimant's knee presented an ongoing problem. (CX 31 at 14). He observed that Claimant was in a depressed state and prescribed Prozac. (CX 31 at 18-9). By January of 1997, Claimant continued to have complaints of back pain, knee pain, neck pain, and carpal tunnel syndrome. (CX 31 at 20).

Dr. McCollister opined that Claimant has developed an osteoarthritic condition in his left knee and had a medial meniscus injury/tear and partial avulsion tear of his cruciate ligament. (CX 31 at 27). At the deposition, he opined that the knee injury was caused by the January accident and that all of the other injuries were caused by the June accident. (CX 31 at 27-8, 45). He testified that the accident of January 22, 1994 brought Claimant's osteoarthritis into disabling reality. (CX 31 at 34). He opined that Dr. Love missed the torn meniscus in his examination. (CX 31 at 73). On March 6, 1996 however, Dr. McCollister stated that Claimant had reinjured his knee in the June 9, 1994 accident. (CX 10 at 31 and 41).

Dr. McCollister testified that Claimant has reached maximum medical improvement from a surgical standpoint, but that he will need ongoing medical treatment. (CX 31 at 36). He opined that Claimant's condition was permanent on August 12, 1998. (CX 10 at 88). He opined that Claimant would need ongoing treatment for his cervical spine condition, his disc problem, his left shoulder injury, his depression, and his osteoarthritic conditions. (CX 31 at 46). He stated that Claimant's knee condition is permanent. (CX 31 at 37).

Dr. McCollister opined that Claimant's knee injury would limit him in returning to work as a truck driver due to the requirement that he use a clutch. (CX 31 at 38). He stated that Claimant would be unable to return to work as a truck driver even without the accident of June 9, 1994. (CX 31 at 38). He testified that the June, 1994 accident had rendered Claimant permanently and totally disabled. (CX 31 at 47). Taking all of Claimant's limitations into consideration, he opined that Claimant could not work an eight hour day. (CX 31 at 41). Based on Claimant's neck and back injury, he limited him to sitting one hour, walking one hour, lifting for one fourth of an hour or less, twisting one hour, standing one hour, no squatting, climbing, or kneeling, lifting zero to twenty pounds, and hand restrictions due to carpal tunnel. (CX 31 at 48). Using the AMA Guidelines, Dr. McCollister found Claimant to have a twelve to fifteen percent disability. (CX 31 at 42). He also opined that Claimant has ongoing depression due to his original knee injury and the subsequent truck accident. (CX 31 at 42). He assessed equal blame for the depression between the

first and second accidents and stated that Claimant would need additional treatment for depression. (CX 31 at 43).

The deposition of Dr. John J. Kroening was taken on September 22, 1998. (BR 4). He is Board Certified as an independent medical examiner and has limited his practice to occupational medicine for twenty years and independent medical examinations for ten years. (BR 4 at 4-6). He examined Claimant on May 4, 1998 and reviewed reports from Dr. Heck, Dr. McCollister, and Dr. Kendrick. (BR 4 at 7, 63). Dr. Kroening found some decreased range of motion in Claimant's neck, but no nerve root compression, neurologic abnormality, or carpal tunnel syndrome. (BR 4 at 12). He found slight limitation in Claimant's left shoulder abduction, but no evidence of impingement of the shoulder. (BR 4 at 12). He found good range of motion in Claimant's lower back and observed that Claimant walked without a limp and moved without restriction. (BR 4 at 12-13). He found tenderness to palpation in Claimant's left knee, but noted good range of motion. (BR 4 at 14).

At the time of the examination, Claimant required further therapy for his knee and Dr. Kroening opined that the knee would improve considerably with physical therapy. (BR 4 at 16). He also opined that Claimant's medical treatment was appropriate, but that any further treatment which was not limited to a supportive role would be unnecessary, unless it was for the knee. (BR 4 at 17-18.).

Dr. Kroening opined that Claimant was restricted in engaging in activities which would require repeated or heavy exertion of the left upper extremity above shoulder level, activities requiring frequent turning or extending of the neck, and frequent lifting which would cause stress to the low back. (BR 4 at 20). He opined that the January, 1994 injury had resulted in a total lateral meniscectomy. (BR 4 at 20). At the time of his examination, Claimant had not yet reached maximum medical improvement with respect to his knee. (BR 4 at 20). Dr. Kroening said that any limitations based on the knee joint would be equally attributable to both workplace accidents. (BR 4 at 21). Both events aggravated Claimant's osteoarthritis. (BR 4 at 38). He opined that Claimant could return to work as a truck driver and that neither workplace accident had rendered him disabled from performing his job, but he stated that it was possible that the clutch would give him problems. (BR 4 at 22-3, 42, 56). Using the AMA Guides, Dr. Kroening found that Claimant had a five percent impairment due to his lumbosacral injury, a fifteen percent impairment for his cervical thoracic injury, a two percent impairment for his shoulder injury, and a three percent impairment for his knee injury. (BR 4 at 24-5). He said that the injuries resulted in a twenty percent impairment of the person. (BR 4 at 25).

The deposition of Dr. Robert P. Goodman was taken on September 24, 1998. (BR 6). He is Board Certified in Orthopedic Surgery. (BR 6 at 51). Dr. Goodman has specialized in the field of orthopedics for thirty years. (BR 6 at 5). He examined Claimant on March 9, 1998. (BR 6 at 6). He observed degenerative changes, cervical spine, status post discectomy, and fusion. (BR 6 at 45). Dr. Goodman explained that a fusion involves removing a bone from the hip and placing it in the neck. (BR 6 at 45). He testified that Claimant told him that the second accident increased his knee pain and caused new pain in his neck, low back, and shoulder. (BR 6 at 13). He said that the fact that Claimant's leg got caught under the seat in the second accident suggested the probability of further injury. (BR 6 at 15). He opined that the condition of Claimant's knee as described in the February 4, 1997 MRI was not caused by the January 23, 1994 accident. (BR 6 at 21-2). He opined that the surgery conducted by Dr. Herr was necessitated by an event subsequent to January 23, 1994. (BR 6 at 23).

Based on his review of the medical evidence, Dr. Goodman opined that Claimant had arthritis in his knee prior to January, 1994 and that his accident irritated this arthritis, resulting in a one percent impairment of the total person under the AMA Guides. (BR 6 at 25). He opined that the second accident further injured his knee and that the reinjury resulted in an additional one percent impairment. (BR 6 at 26). He opined that Claimant may be unconsciously exaggerating symptoms of nerve damage. (BR 6 at 28). After the second accident, Dr. Goodman opined that as a result of his neck injury, the flare-up of arthritis, the surgery that he's had, and the low back injury, Claimant had an impairment of fifteen percent of his person. (BR 6 at 32). He attributed half of this to the arousal of pre-existing conditions. (BR 6 at 32).

On March 9, 1998, Dr. Goodman found Claimant to be at maximum medical improvement. (BR 6 at 54). He did not find the Claimant to be totally disabled and stated that he would improve if he would do more walking. (BR 6 at 33). Dr. Goodman admitted that he did not know how much clutching Claimant would have to do as a truck driver, but opined that Claimant is not capable of doing a lot of clutching. (BR 6 at 33). He testified that Claimant's neck and back prevent him from sitting for over an hour. (Br 6 at 34). He opined that Claimant could work as a short-haul truck driver. (Br. 6 at 34).

Stipulations for Tackett v. Barge and Rail

The parties have stipulated and I find that:

1. The Act (33 U.S.C. § 901, et seq.) applies to this claim.
2. Claimant and Employer were in an employer-employee relationship at the time of the accident/injury.
3. The accident/injury arose out of and in the scope of employment.
4. The accident/injury occurred on January 22, 1994.
5. Employer was advised of or learned of the accident/injury on January 24 or 25, 1994.
6. Timely notice of injury was given the Employer.
7. Employer did not file a first Report of Injury (Form LS-202) with the Secretary of Labor.
8. Claimant filed a Claim for Compensation (Form LS-203) on April 9, 1996.
9. Disability payments have been made pursuant to Kentucky Workers' Compensation from January 27, 1994 to May 4, 1994 at a rate of \$180.08 per week for fourteen weeks, resulting in a total of \$2,815.07.
10. Claimant's "usual employment" consisting of his regular duties at the time of the injury as determined under Section 8(h) of the Act was as a truck driver.
11. Claimant returned to his usual employment on May 4, 1994.
12. Since the date of the accident/injury, the work and earnings record of the Claimant is as follows: driver for Matt's for \$7.00 per hour from May 4, 1994 to June 9, 1994 at total compensation of \$1,741.25. It is contested however whether Claimant worked after the June 9, 1994 accident.

Stipulations for Tackett v. Matt's

The parties have stipulated and I find that:

1. The accident/injury occurred on June 9, 1994.
2. Employer was advised of or learned of the accident/injury on June 9, 1994.
3. Timely notice of injury was given the Employer.
4. No temporary total disability has been paid by Matt's.
5. Claimant's "usual employment" consisting of his regular duties at the time of the injury as determined under Section 8(h) of the act was as a truck driver.
6. The date of maximum medical improvement from the Claimant's work related injury was August 21, 1998.

(JX 2).

Jurisdiction Under the Act

To be covered under the Act, a Claimant must satisfy the status requirement of Section 2(3) of the Act and the situs requirement of Section 3(a). Under Section 2(3), a covered employee includes "any person engaged in maritime employment, including any longshoreman or other person engaged in long shoring operations, and any harbor-worker including a ship repairman, shipbuilder and ship breaker" 33 U.S.C. §902(3)(1994). While maritime employment is not limited to the occupations specifically enumerated in Section 2(3), claimant's employment must bear a relationship to the loading, unloading, building, or repairing of a vessel. See generally Chesapeake & Ohio Ry. Co. v. Schwalb, 493 U.S. 40, 23 BRBS 96 (CRT)(1989). Moreover, an employee is engaged in maritime employment as long as some portion of his job activities constitutes covered employment. Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 275-276, 6 BRBS 150, 166 (1977). A claimant's time need not be spent primarily in long shoring operations if the time spent is more than episodic or momentary. See Boudloche v. Howard Trucking Co., 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), cert denied, 452 U.S. 915 (1981). Under Caputo, a claimant need not be engaged in maritime employment at the time of the injury to be covered under the Act, as the Act focuses on occupation rather than on duties at the time of the

injury. See, e.g., Dupre v. Cape Romain Contractors, Inc., 23 BRBS 86 (1989). Land based workers who, although not actually unloading vessels, are involved in the intermediate steps of moving cargo between ship and land transportation are covered under the Act. P.C. Pfeiffer Co., Inc. v. Ford 449 U.S. 69, 11 BRBS 320 (1979). Truck drivers who are injured while transporting materials from floating platforms to storage piles are covered under the Act even if they never leave the truck cab to assist in the loading. Warner Brothers v. Nelson 635 F.2d 552 (6th Cir. 1980).

Matt's argues that this Court does not have jurisdiction to hear the case against it under the Act. In Donald Waugh v. Matt's Enterprises, Inc.,¹ BRB No. 98-0735 (Feb. 23, 1999), the issue of jurisdiction was effectively analyzed. Like Claimant, Mr. Waugh was a truck driver for Matt's Enterprises. With regard to the status test, Claimant's regular job duties were the same as Mr. Waugh's inasmuch as he transported metal that had been unloaded from barges onto his truck to the scrap field at the South Point facility. This constitutes an integral part of the unloading process. Also like Mr. Waugh, Claimant regularly performed tasks that assisted the process of unloading scrap metal from the barges when he assisted the crane operator in picking up scrap. These activities were neither extraordinary nor episodic and establish that Claimant spent at least some of his time engaged in clearly maritime employment. With regard to Employer's argument that Claimant was unauthorized to assist in the unloading process, I note that Employer was aware that the truck drivers were engaged in this activity and took no disciplinary action against them, thus providing Claimant with tacit approval of his actions. Even without Claimant's activities assisting the crane operator however, I find that his activity as a truck driver moving scrap from a barge to a field on site is sufficient to satisfy the status prong of the test pursuant to Nelson. Accordingly, the status test is satisfied.

With regard to the situs test, I also apply the same reasoning used in Waugh to determine whether Claimant's injury occurred in an "adjoining area" under Section 3(a). Relying on the functional relationship test of Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978), I consider: 1) the particular suitability of the site for the maritime uses referred to in the Act; 2) whether adjoining properties are devoted primarily to uses in maritime commerce; 3) the proximity of the site to the

¹ A status report was submitted by Claimant on March 8, 1999, which announced the recent release of the Waugh decision. In a supplemental brief received on April 5, 1999, Barge and Rail agreed that this decision favored Claimant's position.

waterway; and 4) whether the site is as close to the waterway as feasible given all the circumstances of the case. Id., 568 F.2d at 141, 7 BRBS at 411. Applying these criteria, I find that the scrap field needed to be close to a waterway in order to provide efficient unloading of the barges. I note that the surrounding area was engaged in maritime commerce since one side of the South Point facility involved loading scrap onto barges and the other side involved loading grain onto barges. The scrap field was part of the overall unloading process at the South Point location since the scrap was either unloaded from the barges to the trucks and transported to steel companies, or loaded from the barges to the trucks and transported to the field, where at a subsequent time, the scrap would be loaded from the field by crane onto trucks for delivery to steel companies. I accept Claimant's estimation that the scrap field was only three to four hundred feet from the barge as accurate. Accordingly, I find that the field where Claimant was injured was customarily used by Employer in the overall process of unloading vessels. Inasmuch as the Claimant satisfies both the status and the situs tests, he is covered by the Act.

Causation

With regard to causation, a claimant has the burden of establishing (1) that he sustained physical harm or pain and (2) that an accident occurred in the course of employment, or conditions existed at his workplace, which could have caused harm or pain. Travelers Ins. Co. v. Donovan, 221 F.2d 886 (D.C. Cir. 1955)(citing O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504 (1951); Mulvaney v. Bethlehem Steel Corp., 14 BRBS 593 (1981)). Once this prima facie case is established, a presumption is created under Section 20(a) that the employee's injury arose out of his employment. Once the presumption is invoked, the employer must produce substantial countervailing evidence to rebut it. The employer must produce facts, not speculation, to rebut the presumption. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created in Section 20(a). Dearing v. Director, OWCP, 27 BRBS 72 (CRT)(4th Cir. 1993). If the presumption is rebutted, the issue of causation must be resolved on the whole body of proof. Holmes v. Universal Maritime Service Co., 29 BRBS 18 (1995).

In the case of two work related injuries sustained while working for different employers, if the disability results from the natural progression of the first injury, and would have occurred notwithstanding the presence of a second injury, liability for the disability must be assumed by the employer or carrier for which the claimant was working when he was first injured. In the alternative, if the second injury aggravates the claimant's prior injury, thus further disabling him, the second injury is the compensable

injury, and liability must be assumed by the employer or carrier for whom the claimant was working when he was reinjured. Strachan Shipping Co. v. Nash, 782 F.2d 513 (5th Cir. 1986)(en banc); Abbott v. Dillingham Marine & Mfg. Co., 14 BRBS 453 (1981), aff'd mem. sub nom. Willamette Iron & Steel Co. v. OWCP, 698 F.2d 1235 (9th Cir. 1982). The entire resulting disability is compensable and the relative contributions of the work-related injuries are not weighed to determine amount of entitlement. Johnson v. Ingalls Shipbuilding, 22 BRBS 160, 162 (1989).

In the instant case, there is no dispute that Claimant was involved in two work place accidents, one while employed by Barge and Rail and one while employed by Matt's. The dispute is over which accident caused Claimant's alleged disability. Initially, I note that Claimant returned to a full schedule at work without restriction approximately three and a half months after the January accident. Despite payroll records to the contrary, I credit the statements of Claimant, Mrs. Tackett, Mr. Waugh, and Mr. Hankins as establishing that Claimant did not return to work at all after the June accident. I also note that Claimant indicated that his left leg was caught in the seat and skin was torn from the back of his knee in the June accident. He testified that the injuries to his neck, shoulder, back, and knee all prevent him from working as a truck driver. Although Claimant opined that his knee injury was caused solely by the January accident when he was working for Barge and Rail, I note that he has no medical training.

I now analyze the relevant expert opinions. Ms. Stevens expressed great concern about Claimant's ability to return to work after the January accident. At his deposition, Dr. Herr opined that Claimant's meniscus tear was a result of the January accident, but he expressed the opinion that the June accident caused the meniscus tear in some of his medical records. Ms. Pearson opined that Claimant would have been totally disabled even if the June accident never occurred. Dr. Borders opined that the January accident was seventy-five percent responsible for Claimant's depression, based on Claimant's self-analysis. Dr. McCollister found that Claimant's knee injury was caused by the January accident, but he also testified that Claimant reinjured his knee in the June accident. He opined that Claimant would have been unable to return to work as a truck driver even without the June accident. He stated that Claimant's depression was caused by both accidents, equally.

Dr. Templin stated that Claimant reported a significant increase in knee pain after the June accident. Dr. Love did not find a tear in Claimant's meniscus subsequent to the January accident despite careful probing of his knee in surgery. He also noted that Claimant thought that he had reinjured his knee in the

June accident. Ms. Stevens did not observe any signs of depression in Claimant prior to the June accident. Prior to the June accident, Mr. Gunning noted that Claimant's left leg was improving, but after the June accident, Claimant's leg was found to be in worse condition. Claimant had to cancel one of his appointments because of back pain that came on while driving. Claimant's back was injured in the second, but not the first accident. Dr. Kroening opined that Claimant's knee limitations were equally attributable to both accidents, but opined that Claimant had only a three percent impairment of the knee, but a five percent impairment from his lumbosacral injury, a fifteen percent impairment from his cervical thoracic injury, and a two percent impairment of his shoulder. Only the knee was injured in the January accident. Dr. Goodman noted that Claimant had told him that the second accident increased his knee pain. He opined that it was the second accident which necessitated Dr. Herr's surgery. He also opined that the first accident resulted in a one percent impairment of Claimant's person and that the second accident caused an additional fourteen percent impairment of Claimant's person.

The doctors at King's Daughters', Dr. Justice, Dr. Abler, Dr. Powell, Dr. Aitken, Dr. Tibbs, Dr. Craythorne, Dr. Cowell, and Dr. Heck did not opine with respect to this issue.

In assigning relative weights to the expert opinion evidence, I note that Dr. Love is a Board Certified physician and that he acted as one of Claimant's treating physicians. Dr. Love examined Claimant carefully after each of his workplace injuries. Accordingly, I assign the highest weight to his opinion. Although Mr. Gunning is not a physician, he also had the opportunity to treat and examine Claimant after each of his workplace accidents. This entitles Mr. Gunning's opinion to additional weight. Dr. Kroening's opinion is entitled to additional weight since he is Board Certified and specializes in occupational medicine. Dr. Goodman's opinion is entitled to additional weight since he is a Board Certified physician. Dr. Templin's opinion is entitled to additional weight since he is the medical director of the pain management center at Cardinal Hill Rehabilitation Hospital.

In weighing the evidence, I note that Dr. Herr has expressed inconsistent opinions about the cause of Claimant's knee injury at different times. I give his opinion less weight on this basis. I do not find Ms. Pearson's opinion on this matter to be persuasive since it calls for medical analysis and she is not qualified for this. I do not find Dr. Border's opinion on this matter to be very relevant since Claimant's depression appears to be more of a result of his disability rather than a cause of it. I find Dr. McCollister's opinion that Claimant's knee injury was caused entirely by the January accident to be somewhat inconsistent with

his opinion that Claimant reinjured his knee in the June accident and give less weight to his opinion on this basis. I find that Ms. Stevens' opinion is worthy of consideration, but note that she is not as highly qualified as the experts who treated Claimant and/or hold Board Certifications.

In weighing the medical evidence, I find that the opinions which merit the greatest weight support a finding that Claimant's June, 1994 accident was the cause of his alleged disability. These opinions are supported by the fact that Claimant was eventually able to return to work after the January accident, but has never felt capable of returning after the June accident. Accordingly, I find that Claimant's injury while working for Matt's not only aggravated the injury which he sustained while working for Barge and Rail, but also resulted in new injuries. Thus, if Claimant is entitled to disability compensation, Matt's must assume any liability which is determined.

Nature and Extent of Disability

Under the Act, "disability" is defined as the "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or other employment." 33 U.S.C. § 902(10). Generally, disability is addressed in terms of its extent, total or partial, and its nature, permanent or temporary. A claimant bears the burden of establishing both the nature and extent of his disability. Eckley v. Fibrex and Shipping Co., 21 BRBS 120, 122 (1988); Trask v. Lockheed Shipbuilding and Construction Co., 17 BRBS 56, 59 (1985).

Extent of disability is based on an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Total disability is defined as complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment. Under current case law, the employee has the initial burden of proving total disability. To establish a prima facie case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work-related injury. In performing this analysis, I compare the claimant's medical restrictions with the specific requirements of his usual employment. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988), Mills v. Marine Repair Serv., 21 BRBS 115, on recon., 22 BRBS 335 (1988). At this stage, the claimant need not establish that he cannot return to any employment, only that he cannot return to his former employment. Elliott v. C & P Tel. Co. 16 BRBS 89 (1984). Usual employment refers to the claimant's regular duties at the time he was injured. Ramirez v. Vessel Jeanee Lou, Inc., 14 BRBS 689 (1982). Thus, even a minor impairment can establish total

disability if it prevents the employee from performing his usual employment. Elliott, 16 BRBS at 92 n.4. The claimant's credible complaints of pain alone may be enough to meet his burden. Anderson v. Todd Shipyards Corp., 22 BRBS 20 (1989). Additionally, a psychological injury arising out of a physical injury can support a finding of total disability. Parent v. Duluth, Missabe & Iron Range RY. Co., 7 BRBS 41 (1977).

Once a prima facie case is established, the claimant is presumed to be totally disabled, and the burden shifts to the employer to prove the availability of suitable alternative employment. See New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981), Elliott, 16 BRBS 89. If the employer establishes the existence of such employment, the employee's disability is treated as partial rather than total.

Initially, I must determine whether Claimant is capable of performing his usual employment as a truck driver. It is Claimant's opinion that his injuries have rendered him incapable of driving a truck or even passing a physical to do so. Although Mr. Hankins testified that it is possible to drive a truck with less clutching, there is no evidence that Claimant uses or knows how to use this method. I credit Claimant's testimony that his regular job required him to use his clutch extensively and find that the medical opinions which state that Claimant cannot clutch extensively support a finding that he cannot return to his regular job.

With respect to the expert testimony the opinions of Ms. Pearson, Dr. Templin, Dr. Powell, Dr. Craythorne, Ms. Stevens, Dr. Love, Dr. Herr, Dr. Borders, Mr. Gunning, Dr. McCollister, and Dr. Goodman support a finding that Claimant is not capable of returning to his regular job as a truck driver. Ms. Pearson's opinion is entitled to additional weight since she is a Board Certified Vocational Expert who reviewed extensive medical evidence in reaching her opinion and personally interviewed Claimant. Dr. Love's opinion is also entitled to a great deal of weight since he is a Board Certified physician who treated Claimant extensively. The opinions of Drs. Herr, McCollister, and Borders are also entitled to additional weight since they were rendered by Board Certified physicians who acted as Claimant's treating physicians. Dr. Goodman's opinion is entitled to additional weight since he is Board Certified. Dr. Powell's opinion is entitled to additional weight since he was one of Claimant's treating physicians. Although Mr. Gunning is not a doctor, I give special consideration to his opinion and those of the other physical therapists at the center since these individuals treated Claimant extensively. I find that the opinions of Ms. Stevens, Dr. Craythorne and Dr. Templin are well reasoned and worthy of consideration, but not entitled to any special weight.

The opinions of Drs. Justice, Tibbs, Heck, and Kroening support a finding that Claimant is capable of returning to his regular job as a truck driver. I find that Dr. Justice's opinion is entitled to less weight since he admitted that he did not understand Claimant's symptoms. I find that Dr. Tibbs' opinion is entitled to less weight since it is vague and it is unclear whether he considered Claimant's job as a truck driver to be one of the "lighter duty jobs" that Claimant "may" be able to perform. Dr. Heck's opinion is entitled to less weight since he only assessed Claimant's ability to work from a neurological standpoint and Claimant complains of a multitude of other injuries. Dr. Kroening's opinion is entitled to less weight since he admitted that it was possible that Claimant would have problems using a clutch and using a clutch is an integral part of Claimant's regular job.

The doctors at King's Daughters', Dr. Abler, Dr. Aitken, and Dr. Cowell did not opine on this issue.

In weighing all of the medical evidence together, I find that the most persuasive opinions, rendered by the most highly qualified experts support a finding that Claimant is not capable of returning to his regular job as a truck driver. Accordingly I find that the Claimant has satisfied his burden of proving that he cannot return to his regular job. Thus, he is presumed to be totally disabled.

The burden now shifts to the employer to show the existence of realistically available job opportunities within the geographical area where Claimant resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. I find that Employer has not met its burden. There is no evidence in the record which identifies job opportunities available to Claimant. Dr. Goodman's opinion that Claimant could work as a "short-haul truck driver" is insufficient since Employer has not shown that such a job is realistically available to Claimant. Furthermore, there is no evidence in the record to indicate that Dr. Goodman knows the duties of a short haul truck driver. The opinions of Drs. Tibbs and Craythorne that Claimant can do "light duty" work also fall short of satisfying Employers' burden since no particular jobs which are available to Claimant are identified. Even if such evidence did exist, I would still credit the opinion of the only vocational expert to testify in the case, Ms. Pearson, since she is a Board Certified Vocational Expert, she reviewed an extensive amount of medical evidence, and she interviewed Claimant. Accordingly, I find that Claimant is totally disabled.

Courts have developed two legal standards to determine whether a disability is permanent or temporary in nature and an injured

worker's impairment may be found to be permanent under either of the two tests. Eckley v. Fibrex & Shipping Co., 21 BRBS 120, 122-23 (1988). Under the first test, a disability will be considered permanent if the employee's condition reaches the point of maximum medical improvement. James v. Pate Stevedoring Co., 22 BRBS 271, 274 (1989). Under the second test, a disability will be considered permanent if the impairment has continued for a lengthy period of time and appears to be of a lasting or indefinite duration. Air America, Inc. v. Director, OWCP, 597 F.2d 773, 781-82 (1st Cir. 1979). These two standards, while distinguishable, both define the permanency of a disability in terms of the potential for further recovery from the injury.

I note initially, that Claimant was injured on January 22, 1994 and June 9, 1994 and still felt incapable of working on the date of the hearing, September 30, 1998. On April 20, 1994, Dr. Love found that Claimant was at maximum medical improvement from the injury sustained in his January injury. With respect to the January accident, I credit Dr. Love's opinion that Claimant reached maximum medical improvement on April 20, 1994. I find Dr. Love's opinion persuasive since he is Board Certified and had extensive contact with Claimant as his treating physician.

With respect to Claimant's injuries that were sustained in or aggravated by the June accident, the parties have stipulated and I find that Claimant reached maximum medical improvement on August 21, 1998. (JX 2). Accordingly, Claimant's total disability became permanent on August 21, 1998.

Timeliness of Filing

33 U.S.C. § 913(a) provides that the right to compensation for disability under the Act is barred unless a claim is filed within one year after the injury. The time does not begin to run until the employee is aware, or by exercise of reasonable diligence should have been aware, of the relationship between the injury and the employment. Section 30(f) of the Act provides that where the employer has been given notice, or the employer has knowledge of an injury to the employee and fails, neglects, or refuses to file a report thereof to the Secretary, the limitations in § 13(a) shall not begin to run until such time as the report is furnished. Fortier v. General Dynamics Corp., 15 BRBS 4 (1982), aff'd mem., No. 82-4213 (2d Cir. 1983) and § 702.211. Failure to file such a report will not be excused based on the mistaken belief that state, rather than federal law applies. Castro v. McLean Indus., 12 BRBS 911 (1980).

In the instant case, Barge and Rail learned of the January accident and injury on January 24 or January 25, 1994. (JX 1).

Matt's learned of the June accident and injury on June 9, 1994. (JX 2). Both Employers stipulated that they received timely notice of the injury. (JX 1 and JX 2). Despite this, neither employer filed a Report of Injury (Form LS-202) with the Secretary. (JX 1 and Matts' Brief at 42). Accordingly, the clear language of the statute dictates that the time limits in § 13(a) never began to run and that Claimant's cause of action was filed in a timely fashion.

Average Weekly Wage

Section 10 of the Act provides the means for calculating average weekly wage. 10(a) provides that if the injured employee worked in substantially the same employment for the same or another employer during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of two hundred and sixty times the average daily wage for a five-day worker. 10(b) provides that if the injured employee did not work in such employment during substantially the whole of such year, his average annual earnings shall consist of two hundred and sixty times, for a five day per week worker, the average daily wage which an employee of the same class working substantially the whole of such immediately preceding year in the same or similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed. 10(c) provides that if either of the foregoing methods can not reasonably and fairly be applied, average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees in the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

All of the parties to this cause of action agree that § 10(a) and § 10(b) are unavailable for calculating Claimant's average weekly wage and that § 10(c) must be used. (Claimant's brief at 75, Matt's brief at 42, and Barge and Rail's brief at 30). I agree that § 10(a) is unavailable since Claimant only worked at this employment for eleven weeks prior to his first accident and less than an additional five weeks prior to his second accident. I also agree that § 10(b) is unavailable since there is no evidence in this case of the earnings of an employee of the same class working in the immediately preceding year. Thus, I must arrive at an average weekly wage using § 10(c).

This Court has broad discretion in determining annual earning capacity under § 10(c). Sproull v. Stevedoring Sers. Of America,

25 BRBS 100, 105 (1991). I do not find that the Claimant's pay records at Matt's and Barge and Rail accurately represent his earning capacity. Claimant only worked a brief time before he was injured and resumed for an even shorter period before he was injured again. The pay records in this case provide only snapshots of Claimant's work record. They are poor indicators of what Claimant's work record would have been if he had not been injured twice on the job. Additionally, I note that Claimant, Mrs. Tackett, Mr. Waugh, and Mr. Hankins all questioned the accuracy of Claimant's pay stubs as an indication of his work record. Mr. Hankins testified that Claimant was utilized like a full time worker. Accordingly, I find that Mr. Waugh's earnings record for 1994 provides the best available means for estimating Claimant's earning capacity. Mr. Waugh testified that his job was identical to Claimant's and that he took over Claimant's position when Claimant was injured for the second time. Mr. Waugh's K-2 wage and tax statement indicates that he earned \$17,312.53 in wages in 1994. (CX 22). Dividing by fifty-two results in an average weekly wage of \$332.93. Accordingly, I find Claimant's average weekly wage to be \$332.93 pursuant to § 10(c).

8(f)

Barge and Rail seeks relief under § 8(f) of the Act. Section 8(f) shifts part of the liability for permanent total disability from the employer to the special fund when the disability is not due solely to the injury which is the subject of the claim. This provision serves to prevent discrimination against handicapped workers. Three prerequisites must be met for § 8(f) to apply, to wit: 1) The claimant had an existing permanent partial disability before the most recent injury; 2) The pre-existing disability, in combination with the subsequent work injury, contributes to a greater degree of permanent disability and; 3) The injured worker's existing permanent partial disability was manifest. Director, OWCP v. Campbell Industries, Inc., 678 F.2d 836 (9th Cir. 1982), cert. denied, 459 U.S. 1104 (1983); Director, OWCP v. Berkstresser, 921 F.2d 306, 309, 24 BRBS 69 (CRT)(D.C. Cir. 1990), rev'g 16 BRBS 231 (1984), 22 BRBS 280 (1989). The mere fact of past injury does not establish disability, rather, the employer must establish that the injury has produced a serious, lasting problem. Lockheed Shipbuilding v. Director, OWCP, 951 F.2d 1143, 1145-46, 25 BRBS 85 (CRT)(9th Cir. 1991). Learning disabilities and psychiatric disorders can satisfy the pre-existing condition requirement if they are serious enough that they could motivate a cautious employer to discharge an employee. State Comp Ins. Fund v. Director, OWCP, 818 F.2d 1424, 20 BRBS 11(CRT)(9th Cir. 1987); Director, OWCP v. Potomac Elec. Power Co., 607 F.2d 1378, 10 BRBS 1048 (D.C. Cir. 1979). The Sixth Circuit Court of Appeals has held that the manifestation requirement is satisfied as long as the

existence of the underlying condition is documented by someone prior to the workplace injury in question. The employer need not have actual knowledge. American Shipbuilding Co. v. Director, OWCP, 865 F.2d 727, 731-32, 22 BRBS 15 (CRT) (6th Cir. 1989). The burden of proof is on the employer to prove all the facts necessary for 8(f) relief. Bullock v. Sun Shipbuilding and Dry Dock, 13 BRBS 380 (1981).

With regard to the requirement that Claimant have a pre-existing permanent disability, I note that a radiology report taken by Dr. Bond on January 26, 1994 indicated mild degenerative osteoarthritic change in Claimant's left knee. Dr. Love, Dr. Kroening, Dr. Goodman, and Dr. McCollister opined that Claimant had osteoarthritis prior to his workplace injury. The psychiatric evaluations of Drs. Cowell and Borders indicated that Claimant had underlying psychological issues related to the death of his son prior to the workplace accidents. Additionally, Dr. Borders opined that Claimant had below average intelligence and poor coping skills. Ms. Pearson also found Claimant to have poor reasoning skills.

Dr. Goodman is Board Certified in Orthopedic Surgery, Dr. Kroening is Board Certified as an independent medical examiner, Dr. McCollister is Board Certified in Internal Medicine, Ms. Pearson is a Board Certified Vocational Expert, Dr. Borders is Board Certified in Psychiatry in addition to being one of Claimant's treating physicians, and Dr. Love also is a Board Certified physician, in addition to being one of Claimant's treating physicians. I find that the opinions of these experts are sufficient to demonstrate that Claimant had serious pre-existing conditions prior to his January accident, ie. osteoarthritis in his left knee, poor coping skills, poor reasoning skills, and emotional trauma related to the death of his son.

I now determine whether these pre-existing conditions, in combination with the workplace injury, result in a greater total disability. Dr. Love, Dr. Goodman, and Dr. Kroening opined that Claimant had pre-existing osteoarthritis which was worsened by his workplace accident. Dr. McCollister also testified that Claimant's January accident brought his pre-existing osteoarthritis into disabling reality. Dr. Border's opinion that Claimant has poor coping abilities suggests that his depression has been worsened by the fact that Claimant cannot deal effectively with adversity. I find that these opinions are sufficient to prove that Claimant's pre-existing conditions, in combination with his workplace injury, resulted in a greater total disability.

Finally, the employer must show that Claimant's pre-existing conditions were manifest. I credit Claimant's testimony that he

was not given a pre-employment physical. There is no evidence in the record which demonstrates that any of Claimant's pre-existing conditions were documented by anyone prior to his January 22, 1994 workplace injury. Barge and Rail cannot prevail in its claim for § 8(f) relief absent this showing. Accordingly, I find that Barge and Rail has failed to carry its burden and is not entitled to §8(f) relief.

Medical Benefits

Section 7(a) of the Act provides that an employer shall furnish medical and surgical treatment for an employee for such period as the nature of the injury or the process of recovery may require. Medical benefits are not compensation and are not time-barred under Section 13 of the Act. See Mayfield v. Atlantic & Gulf Stevedores, 16 BRBS 228, 230 (1984). To be entitled to medical benefits under Section 7, a claimant need not establish that the injury has caused a reduction in wage-earning capacity. Rather, a claimant need only establish that the injury is work-related. See Winston v. Ingalls Shipbuilding, Inc., 16 BRBS 168, 174 (1984).

I have already determined that Claimant reached maximum medical improvement for his January knee injury on April 20, 1994. Accordingly, I find that Barge and Rail is responsible for all of Claimant's medical bills related to his knee injury up to this date. Claimant's only other symptoms which are attributable, at least in part, to the January accident relate to his depression. Claimant testified that he began to feel depressed prior to his June accident. Ms. Stevens did not observe any signs of depression in Claimant between February 16, 1994 and April 20, 1994, but did not feel capable of making a definitive statement about whether he had depression during this time period. Dr. Cowell opined that Claimant was experiencing a major depressive disorder and that ongoing treatment was appropriate and medically necessary, but he did not assess blame between the two accidents. Dr. Borders attributed seventy-five percent of Claimant's depression to the January accident and twenty-five percent to the June accident. Dr. McCollister also observed Claimant to be depressed and attributed equal responsibility for this condition between the January and June accidents. Inasmuch as Dr. Borders is a Board Certified Psychiatrist who has a history of treating Claimant, I find his opinion to be the most reliable with respect to this issue and credit his finding as accurate. Accordingly, Barge and Rail must pay seventy-five percent of Claimant's past, present, and future medical bills for treatment of his depression and Matt's must pay twenty-five percent of these bills. Based on my causation analysis, Matt's must pay for all of Claimant's medical bills

related to his workplace injuries other than that which I specifically allocated to Barge and Rail above.

Credit for State Workers' Compensation Payments

It is well established that benefits awarded under the Act must be discounted to reflect those already received under state law. 33 U.S.C. § 914(j). Claimant acknowledges that Employers are entitled to credit for payments made under state workers' compensation law. (Claimant's brief at 72 and 90). The employers are entitled to this credit where applicable.

Attorney Fee

Thirty days is allowed to Claimant's counsel for the submission of an application for an attorney's fee. The application shall be prepared in strict accordance with 20 C.F.R. § 702.132. The application must be served on all parties, including the Claimant, and proof of service must be filed with the application. The parties are allowed 15 days following the service of the application to file objections to the application for an attorney's fee.

ORDER

Based on the above findings of fact and conclusions of law, I make the following compensation order. The specific computations of the compensation award and interest shall be administratively performed by the District Director.

1. Matt's Enterprises, Inc. shall pay to Claimant temporary total disability for the period from June 9, 1994 to August 21, 1998 based upon an average weekly wage of \$332.93, such compensation to be computed in accordance with 33 U.S.C. § 908(b), subject to the limitations at sections 6(b)(1) and 6(b)(2) of the Act, if applicable.
2. Matt's Enterprises, Inc. shall pay to Claimant permanent total disability from the date of August 21, 1998 based upon an average weekly wage of \$332.93, such compensation to be computed in accordance with 33 U.S.C. §§ 908(a) and 910(f), subject to the limitations at sections 6(b)(1) and 6(b)(2) of the Act, if applicable.

3. Barge and Rail Terminals, Inc. shall furnish seventy-five percent of all reasonable, appropriate, and necessary medical care related to Claimant's depression and pay for all reasonable, appropriate, and necessary medical care related to Claimant's knee injury on January 22, 1994 and incurred on or prior to April 20, 1994 pursuant to Section 7 of the Act.
4. Matt's Enterprises, Inc. shall furnish twenty-five percent of all reasonable, appropriate, and necessary medical care related to Claimant's depression and pay for all of Claimant's reasonable, appropriate, and necessary medical care related to Claimant's accident on June 9, 1994 and incurred on or subsequent to June 9, 1994.
5. Both Barge and Rail Terminals, Inc. and Matt's Enterprises, Inc. shall receive credit for all amounts of compensation previously paid to Claimant as a result of his injuries arising from the January 22, 1994 and June 9, 1994 accidents, respectively. 33 U.S.C. 914(j).

RUDOLF L. JANSEN
Administrative Law Judge